No. 10931

In the United States Circuit Court of Appeals for the Ninth Circuit

WILLIAM JENNINGS BRYAN, JR., INDIVIDUALLY AND AS COLLECTOR OF CUSTOMS FOR THE PORT OF LOS ANGELES, CUSTOMS COLLECTION, DISTRICT NO. 27, APPELLANT

v.

UNION OIL COMPANY OF CALIFORNIA, A CORPORATION, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S OPENING BRIEF

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OPINION BELOW

The opinion of the United States District Court for the Southern District of California, Honorable J. F. T. O'Connor, District Judge, is reported at 52 F. Supp. 256, 1944 A. M. C. 829.

JURISDICTION

This is an appeal from a final judgment for the plaintiff entered by the United States District Court for the Southern District of California, Central Division, in a civil action by the Union Oil Company of California against William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection, District No. 27, to recover tonnage tax assessed and paid upon plaintiff's vessel the S. S. *Montebello.*

The judgment of the District Court was entered August 16, 1944 (R. 68). Notice of Appeal to this Court was filed October 12, 1944 (R. 73). The jurisdiction of this Court rests upon Section 128 (a) of the Judicial Code, as amended (28 U. S. C. 225 (a)). The complaint (R. 2–5) invoked the jurisdiction of the District Court under Section 24 (5), as amended (28 U. S. C. 41 (5)).

STATUTES AND REGULATIONS INVOLVED

The principal statutes and regulations involved are printed in the appendix, *infra,* p. 52.

QUESTIONS PRESENTED

Where a vessel was entered at Port San Luis, California, from a voyage beginning at Talara, Peru, and including Vancouver, B. C., with cargo from Talara to Vancouver and in ballast from Vancouver to Port San Luis, and tonnage tax at the rate applicable to voyages from Talara was paid without protest by plaintiff, who thereafter applied to the Director of the Bureau of Marine Inspection and Navigation for refund of the difference between the amount of tax thus paid and the amount computed at the lower rate applicable on voyages from Vancouver:

1. Whether or not the court has jurisdiction of an action against the collector individually for recovery of the amount which the Director refused to refund to plaintiff;

2. Whether or not, if the court has jurisdiction of an action against the collector, the decision of the Director on plaintiff's application for refund is final and conclusive upon the court as to the rate of tonnage tax applicable;

3. Whether or not, if the court is not concluded by the Director's decision, the rate applicable to voyages from Talara or that applicable to voyages from Vancouver should be applied.

STATEMENT OF THE CASE

The Pleadings.—Appellee Union Oil Company of California, hereinafter referred to as plaintiff, brought this civil action as owner of the American Tank Steamer *Montebello* against appellant William Jennings Bryan, Jr., hereinafter referred to

as the defendant or collector, to recover an alleged overpayment of tonnage duty or tax. The complaint (R. 2–5) alleges that on October 23, 1940, the vessel cleared Los Angeles for Iquique, Chile, with cargo for various ports in Chile, that after discharging she proceeded in ballast to Talara, Peru, where she loaded a cargo and cleared for Ioco, B. C.; that she discharged all cargo at Ioco and proceeded in ballast to Port San Luis, arriving December 24, 1940; that at Port San Luis defendant collected tonnage duty or tax at the rate of 6 cents per ton; that the vessel was lawfully entitled to pay tax at the rate of 2 cents per ton, and the collection in excess of 2 cents per ton "was and is illegal, arbitrary, oppressive, and deprives plaintiff of his property without due process of law." There was no allegation that payment was made under protest or that defendant retained possession or control of the amount collected. No mention was made of plaintiff's application for refund and its denial by the Director of the Bureau of Marine Inspection and Navigation.

A motion for summary judgment for defendant (R. 6) on the basis of the record before the Director (R. 7–29) was denied (R. 31) and defendant answered. The answer (R. 33–35) admits the basic allegations of fact but denies the conclusions that the vessel was entitled to pay tax at the 2-cent rate and that the collection at the 6-cent rate was illegal (Ans. I–V, R. 33–34). The answer further sets up as affirmative defenses that plaintiff appealed to the Director for refund, who after hearing denied the appeal, whereby the Court is concluded (Ans. VI–VII, R. 34) and that the crew was shipped for a voyage to Chilean ports and back to the Pacific Coast and was paid off after entry at Port San Luis, and the master's oath on entry certified the return voyage began at Talara (Ans. VIII–IX, R. 35).

The Facts.—The case was tried to the court without a jury on the pleadings and a stipulation of agreed facts (R. 39–44).[1] The district judge entered an opinion (R. 45) and later filed

[1] As the stipulation and the administrative record before the Director were substantially in accord defendant-appellant did not insist that the case be considered solely on the administrative record. See *infra*, note 29.

findings of fact and conclusions of law (R. 60–67) which may be quickly summarized.

About October 23, 1940, the *Montebello* loaded a mixed cargo of fuel oil, crude petroleum, and diesel oil for discharge at various ports in Chile, shipped a crew on articles for a voyage to Iquique, Valparaiso, and Antofagasta, Chile and return to a Pacific Coast United States port and cleared Los Angeles for Iquique, Chile. During the latter part of November the vessel discharged the fuel oil at Iquique, the crude oil at Valparaiso, and the remaining cargo at Antofagasta. Having discharged all outward cargo, the vessel proceeded in ballast to Talara, Peru, where she loaded a cargo of crude petroleum and cleared November 27, 1940, for Vancouver, B. C. At Vancouver she discharged her entire cargo on December 17, 1940, and proceeded in ballast to Port San Luis, California, where she arrived on December 24, 1940 (Fdgs. V–XII; R. 61–62).

On arrival at Port San Luis the master entered the vessel at the Customs House and filed a master's oath "On Entry of Vessel from Foreign Port," which showed the vessel as arriving from a voyage which "began at Talara, Peru on November 28, 1940, and included the following ports from which said vessel sailed in the order and on the dates stated, viz., Vancouver, B. C., 12/17/40" (Exhibit A, R. 9 and 36). This oath was filed only after refusal of the Deputy Collecter of Customs at Port San Luis to accept a master's oath which showed the *Montebello* as arrriving from Vaucouver, Canada. Upon the entry of the vessel and the filing of the oath the defendant demanded and collected tonnage duty at the rate of 6 cents per ton in the total sum of $306.42. Thereafter the crew was paid off and discharged before a United States Shipping Commissioner and the vessel surrendered her certificate of registry and was issued a certificate of enrollment and license entitling her to engage in the coastwise trade (Fdgs. XIII–XVI, R. 63).

Plaintiff, by letter of May 7, 1941 (Exhibit C, R. 16–17) applied to the Director of the Bureau of Marine Inspection and Navigation for refund of $204.28, representing the difference between the amount of tonnage tax collected at the

6-cent rate and the amount computed at the 2-cent rate which plaintiff deemed applicable. The defendant collector procured from the deputy collector at Port San Luis a report of facts relating to the imposition and collection of the tax (Exhibit D, R. 18–19) and transmitted the application for refund and the report to the Director by letter of May 14, 1941 (Exhibit E, R. 13–14). The administrative practice of the Director was to afford any party in interest upon request an opportunity to appear and be heard either before the Director or one of his assistants, but neither customs brokers who entered vessels nor the owners of the vessels were ever advised that an oral hearing could be had. About May *31,* 1941 [sic] the Director after deliberation found and decided that the tonnage taxes collected were correctly assessed and denied plaintiff's application for refund. This opinion and decision of the Director is contained in a letter of May *21,* 1941 [sic] (Exhibit G, R. 21–23) and plaintiff was duly notified (Fdgs. XVII–XIX, R. 64–65). As a final finding of fact the court stated:

> The court finds that the demand and collection of said tonnage duty or tax in excess of two (2) cents per ton from the plaintiff was and is illegal, arbitrary, oppressive and deprives plaintiff of his property without due process of law (Fdg. XXIV, R. 66).

The Decision Below.—In its opinion (R. 45–47) and conclusions of law (R. 66–67) the District Court held it had jurisdiction of the action to recover the alleged overpayment by suit against the collector and was entitled to consider the case *de novo* and substitute its interpretation of the tonnage tax statute for that of the Director.

It declared (R. 47–48) that the finality given the Director's decisions was limited to preventing administrative review and stated:

> Prior to the enactment of the Act of July 5, 1884, an appeal could be taken to the Secretary of the Treasury for a refund of tonnage, (Act of June 30, 1864) and to the Department of State upon the interpretation of treaties involving the collection of said tax. The Act

> of July 5, 1884, was a reorganization measure. See statement, Representative Dingley, 15 Congressional Record, Part 4. This Act ended administration confusion and made the decision of the Commissioner of Navigation final, thus terminating appeals to the Secretary of the Treasury, the Secretary of State, or any other administrative head. There was no intention on the part of Congress to deprive the courts of jurisdiction.

In support of this conclusion the court relied on the Attorney General's failure to appeal from the decision overruling the collector's demurrer to the shipowner's complaint in *Laidlaw* v. *Abraham,* 43 Fed. 297 (1890, C. C. Ore.) and the fact that Section 24 of the Judicial Code, 1911 (28 U. S. C. 41 (5)), in conferring jurisdiction on the district courts, retains the specific reference to suits involving tonnage statutes.

With respect to the interpretation of the tonnage tax statute, the court declared (R. 54–55), that "a vessel enters the United States from that foreign port from which she last cleared". It rejected the theory of the Director's decision, that the vessel entered from Talara since it was always her intention to accomplish a voyage to South America and back to a Pacific Coast United States port, and stated that as the defendant did not plead and prove that in calling at Vancouver, B. C. the vessel was attempting deliberately to evade payment at the 6-cent rate, the action of the defendant collector must be deemed arbitrary.

Finally, the court concluded (R. 56–59) that it had jurisdiction of an action against the defendant collector, despite his having deposited the funds into the Treasury. It relied particularly on *DeLima* v. *Bidwell,* 182 U. S. 1 (1901), as holding that such payment over of the funds was no longer a defense in view of Revised Statutes 989, and cited *Border Line Transportation Co.* v. *Haas,* 128 F. (2d) 192 (1942, C. C. A. 9) and *Cosulich Line* v. *Elting,* 40 F. (2d) 220 (1930, C. C. A. 2), as sustaining the jurisdiction. No reference was made to the absence of protest.

SPECIFICATIONS OF ERROR

1. The Collector of Customs, acting in his official capacity as an officer of the Government, may not be sued in the District Court for the recovery of erroneously assessed tonnage duties. Such a suit is in reality one against the United States which may not be maintained unless the United States has consented to be sued in such form. That consent is lacking.

2. The District Court lacks jurisdiction over a controversy involving the assessment, collection, and refund of tonnage taxes. The decision of the Director of the Bureau of Marine Inspection and Navigation as to the correctness of the assessment by the Collector of Customs is final and not subject to judicial review.

3. The determination by the Collector of Customs, as affirmed by the Director of the Bureau of Marine Inspection and Navigation, that the *Montebello* entered from Talara, Peru, and not from Vancouver, B. C., being a question of fact, is not subject to judicial review. Even if reviewable by the courts, it should have been given great weight and not overturned unless clearly wrong and unsupported by the evidence.

4. The tonnage taxes were correctly assessed by the Collector of Customs. A vessel arriving in ballast at a port of entry in the United States from a port at British Columbia where said vessel had entered and discharged fully its cargo theretofore loaded at a foreign port for discharge in said port in British Columbia is subject to the payment of tonnage duty or tax at the rate of 6 cents a ton and not at the rate of 2 cents a ton under the provisions of Title 46 U. S. C. 121.

SUMMARY OF ARGUMENT

I

The Collector of Customs acting in his official capacity as an officer of the Government may not be sued in the district court for the recovery of an excess of tonnage duties alleged to be

erroneously assessed and collected by him. In reality such a suit is against the United States which has not consented to be sued. The cases relied on by the court below involve the individual liability of collectors where payment was made under protest and has been retained by the collector or where the collector is liable for his own wrongful act in exceeding the authority conferred on him by statute. They are not applicable here where plaintiff conceded liability to tonnage tax, paid without protest, and later exhausted his administrative appeal. In such a situation plaintiff is estopped from proceeding against the collector and is confined to his remedy against the United States.

II

In any case the district court lacked jurisdiction to disregard the decision of the Director and try *de novo* a controversy involving the assessment, collection and refund of tonnage taxes. The Act of 1884 makes the decision of the Director final and not subject to judicial review. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof and due process are therefore open. When Congress empowers an administrative authority to decide a question finally it must be assumed that it intended the matter to be submitted to the judgment and discretion of trained specialists rather than to a court. Where, as here, the decision of the administrative authority is fully supported by evidence in the record and has a reasonable basis in point of law it may not be overruled.

III

Even if it be held that suit will lie against the collector and that the decision of the Director is subject to review and modification by the court, in the circumstances of the present case, it is clear that the 6-cent rate alone correctly applies. There is no question that the voyage of the *Montebello* was to South American ports and was therefore a voyage within the long-voyage limits. Interpreted in the light of the legislative history and settled administrative construction, the tonnage statute plainly intends that the 2-cent rate shall be applied

only to vessels entering from voyages to short-voyage ports and the 6-cent rate to all those entering from voyages to long-voyage ports.

ARGUMENT

I. Suit will not lie against the collector to recover an alleged excess in tonnage tax paid without protest

The Collector of Customs, acting in his official capacity as an officer of the Government, may not be sued in the District Court for the recovery of an excess of tonnage duties alleged to be erroneously assessed. Such a suit is in reality one against the United States and may not be maintained unless the United States has consented to be sued in that form. Such consent, granted by statute in the case of income taxes and customs duties, has been repealed so far as concerns tonnage taxes. The cases relied on by the court below involve the individual liability of collectors for their own wrongful acts and are inapplicable here where plaintiff conceded liability to tonnage tax and paid without protest but contests the correctness of the classification and rate at which it was assessed and the correctness of the ruling of the Director of the Bureau of Marine Inspection and Navigation [2] on its application for refund. In such a situation plaintiff is estopped.

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[2] From 1834 until 1903 vessels were regulated by the Bureau of Navigation, Department of the Treasury. In 1903 Congress caused the regulation of vessels, including the bureaus connected therewith, to be transferred from the Treasury to the Department of Commerce. By proper regulations, the various offices of Collectors of Customs thereafter acted as agents of the Department of Commerce in the administration of navigation laws, including the collection of tonnage taxes. Customs Regulations, 1915, Article 982; Customs Regulations, 1923, Article 1104; Customs Regulations, 1931, Article 208. But decision of the Chief of Bureau in the Department of Commerce is final on all questions of interpretation relating to the collection of tonnage tax and its refund when collected erroneously or illegally. Customs Regulations, 1915, Article 117; Customs Regulations, 1923, Article 120; Customs Regulations, 1931, Article 132c; Customs Regulations, 1937, Article 133c; Department of Commerce, Regulations for documentation, entrance and clearance of vessels, tonnage duties, 1938, III, 4 (c) (46 C. F. R. 3.4 (c)). Subsequent to the transactions involved in the instant case the regulation of vessels was retransferred to the Department of the Treasury by Executive Order No. 9083, dated February 28, 1942, 7 F. R. 1609.

1. *Statutory authority for suit against the collector to recover amounts of tonnage tax alleged to be erroneously assessed existed only between 1864 and 1890 and exists no longer.*— Authority to bring suit to recover tonnage taxes was late in coming and has been lacking for almost two generations. The Supreme Court in *Cary* v. *Curtis,* 3 How. 236 (1845) held that section 2 of the Act of March 3, 1839, c. 82, 5 Stat. 348,[3] which required the Collector of Customs to pay into the Treasury all moneys received "for duties paid under protest against the rate or amount of duties charged" and provided for the refund by the Secretary of the Treasury of any duties improperly collected, effectively abolished all right of suit and left only the administrative remedy. Congress, being then in session, promptly passed the Act of February 26, 1945, c. 22, 5 Stat. 727, providing that nothing in the Act of 1839 should be construed to take away or impair the right to maintain suit against the collector so far as concerned any payment under protest in order to obtain goods, wares, or merchandise. But with respect to duties on tonnage, Congress made no corresponding provision and until 1864 the only remedy was by the administrative appeal.

Statutory authority for suit against collectors for recovery of payments of tonnage duties was not conferred until enactment of section 14 of the Act of June 30, 1864, c. 171, 13 Stat. 214, which became Revised Statutes 2931. That statute extended to tonnage duties a new statutory procedure for payment under protest and suit against the collector and impliedly repeal the Act of 1845[4] and with it all common-law right of action. *Barney* v. *Watson,* 92 U. S. 449, 452–453 (1875). This statutory procedure of R. S. 2931 continued in effect until its repeal by section 29 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, but exists no longer.

Before the Act of 1864 and subsequent to its repeal no suits at common law appear ever to have been attempted until the institution of the present suit and its companion cases in the

[3] Later, R. S. 3010, still in force as 19 U. S. C. 1512.

[4] The changes of the Act of 1864 were radical in this and other respects. See letter of the Secretary of the Treasury, dated January 18, 1886, House Ex. Doc. 43, 49th Cong., 1st sess., p. 4 [serial vol. 2392].

Southern District of California.[5] Moreover, during the period of forty-five years while the statute was in effect only two suits against collectors for recovery of tonnage tax are disclosed by the law reports or the records of the Department of Justice. *North German Lloyd S. S. Co.* v. *Hedden,* 43 Fed. 17 (1890, C. C. N. J.); *Laidlaw* v. *Abraham,* 43 Fed. 297 (1890, C. C. Ore.). Both those cases were brought under R. S. 2931 against collectors in circumstances similar to those of the instant case.

The *North German Lloyd* case was a test case brought by agreement between the steamship companies and the Government to obtain a judicial settlement of the authority of the Commissioner of Navigation and the Secretary of the Treasury under section 3 of the Act of July 5, 1884, c. 221, 23 Stat. 119 and section 26 of the Act of June 26, 1884, c. 121, 23 Stat. 59; [6] the identical provisions involved in this case. After trial on the merits judgment was entered for the defendant collector on May 21, 1890. The Court held in accordance with the literal language of section 3 that the decisions of the Commissioner of Navigation respecting the interpretation of the laws relating to tonnage tax were final and the Court had no jurisdiction to review them. In apparent reliance upon the Court's decision, from which no appeal was taken, Congress, by section 29 of the Act of June 10, 1890, c. 407, 26 Stat. 131, expressly repealed R. S. 2931 and, by sections 14 and 15 substituted a new procedure providing for appeal "as to all fees and exactions of whatever character (except duties on tonnage)" to the Board of General Appraisers, now the United States

[5] Two other cases similar to the present are now on appeal to this Court but are stayed pending the outcome of this appeal. *Bryan* v. *British Ministry of Shipping,* No. 10017; *Bryan* v. *Tanker Corp.* No. 10018.

[6] As stated by the Court (43 Fed. 17) the plaintiff had appealed to the Secretary of the Treasury and "at the suggestion of the latter officer and with the concurrence of the Department of Justice, brought these actions to determine the authority of the defendants." The Department files show, however, that despite requests by the District Attorney, the Department did not regard the question as needing to be briefed and in its opinion the Court complains (43 Fed. 23) that "the labor and responsibility of the Court have been increased by the omission of the defendants' counsel to furnish any assistance toward the solution of the questions, and permitting them to pass *sub silentio.*"

Customs Court.[7] The matter of tonnage duties was thus returned to the situation in which it had existed from 1839 to 1864 except that final decision was by the Commissioner of Navigation as prescribed by the Act of 1884, instead of by the Secretary of the Treasury.

The *Laidlaw* case had, meanwhile, been independently brought in the Circuit Court at Portland, Oregon, and on August 18, 1890, the Court overruled a demurrer by the collector to the plaintiff's petition. The Court did not consider the *North German Lloyd* case and without substantial discussion held the Commissioner's decisions were final and conclusive only so far as the Treasury Department was concerned. But plaintiff had applied to the Treasury for reconsideration of its application for refund and, before further court proceedings could be had, refund was ordered. In later unreported proceedings a judgment of nonsuit with costs against the plaintiff was entered April 15, 1891.[8] No appeal was therefore possible.

Regardless of the merits of the respective cases, neither is an authority for plaintiff here. Revised Statutes 2931 now stands repealed and plaintiff can point to no statutory authority for this suit. Neither can it complain of the absence of such authorization, nor the power of Congress to withdraw it. The suit for the refund of taxes is essentially one which is brought against the United States, even though the Collector be the

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[7] *Schoenfeld* v. *Hendricks*, 152 U. S. 691 (1894). Cf. provisions now in effect, 19 U. S. C. 1514, 1515, derived from sections 514 and 515 of the Tariff Act of June 17, 1930, c. 497, Title IV, 46 Stat. 734.

[8] The order stated as follows: "Now at this day comes the plaintiff in the above entitled cause by Mr. C. E. S. Wood, of counsel, and the defendant by Mr. Franklin P. Mays, of counsel, and thereupon said plaintiff moves the court for a judgment of nonsuit herein: and it appearing to the court that there has been no counter claim set up in this cause by the defendant, It is Considered that said plaintiff take nothing by this action; and that the defendant go hence without day, and that he have and recover of and from said plaintiff his costs and disbursements herein to be taxed."

The assertion of the court below (R. 50) that in failing to appeal from the order overruling its demurrer the Government acquiesced in the views enunciated by the Oregon Court is not understood. Such an order is not appealable and it is evident from the facts stated in the Court's opinion that administrative refund would be ordered if proof of such allegations were submitted. The implication of the Court's opinion that the Government should have continued to refuse a refund justly due solely in order to litigate the jurisdictional point seems opposed to American traditions.

nominal party defendant. Thus, in *Curtis's Administratrix* v. *Fiedler,* 2 Black 461, 479 (1862), it was said that "the right of action given is in its nature a remedy against the Government." In *Philadelphia* v. *Collector,* 5 Wall. 720, 733 (1866), the Court said that "a judgment against the collector in such a case is in the nature of a recovery against the United States." In speaking of the suit against the collector, the Court in *Nichols* v. *United States,* 7 Wall. 122, 127 (1868), after pointing out the sovereign immunity to suit, said that "the allowing of a suit at all, was an act of beneficence on the part of the government." In *Collector* v. *Hubbard,* 12 Wall. 1, 14 (1870), the Court stated that the remedies for the recovery of taxes "may be withdrawn altogether at the pleasure of the law-maker." In *Auffmordt* v. *Hedden,* 137 U. S. 310, 329 (1890), the Court said that "the action is, to all intents and purposes, with the provisions for refunding the money if the importer is successful in the suit, an action against the government for moneys in the Treasury." The *Auffmordt* case, with other tax cases, was cited in *Ex parte Bakelite Corp.,* 279 U. S. 438, 451, (1929), to establish the proposition that tax controversies were completely within the control of Congress, and this statement was repeated in *Crowell* v. *Benson,* 285 U. S. 22, 50–51 (1932). Finally, in *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 382–383 (1933), the Court said:

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. *Philadelphia* v. *Collector, supra,* p. 731. There may have been utility in such procedural devices in days when the Government was not suable as freely as now. *United States* v. *Emery, supra; Ex parte Bakelite Corp.,* 279 U. S. 438, 452; Act of February 24, 1855, c. 122, 10 Stat. 612, Secs. 1 and 9; Judicial Code, Sec. 145; 28 U. S. C., Sec. 250; Judicial Code, Sec. 24 (20); 28 U. S. C., Sec. 41 (20). They have little utility today, at

> all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics added.]

The history of the customs administration would seem to preclude any doubt as to the power of Congress to withdraw suit against the Collector. Not since the Act of 1890 (sec. 25, c. 407, 26 Stat. 131) has it been possible to sue the collector for duties erroneously assessed on imports; the United States has been made the sole party defendant yet the validity of the Act has never been doubted by the courts. *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693–695 (1894); *United States* v. *Passavant,* 169 U. S. 16, 21 (1898); *Ex parte Bakelite Corp.,* 279 U. S. 438, 451–452, 458 (1929); *United States* v. *Stone & Downer Co.,* 274 U. S. 225, 232–233. (1927).

At the present time, therefore, it is submitted that, unless plaintiff can find authority for proceeding against the collector at common law, it has mistaken its remedy and cannot maintain its action in this form.

2. *Common law principles do not support an action against the collector in the circumstances of this case.*—The common law liability of the collector is personal. It is based in differing circumstances upon two distinct theories. On the one hand, where the collector has acted in good faith but is in possession of the money, the law will imply an obligation to restore it. In this situation payment over by the collector is a complete defense. On the other hand, where the collector has acted wrongfully and with knowledge, the law will imply an obligation to make the taxpayer whole and leave to a collector who has paid over the problem of obtaining reimbursement.

The first theory involves an application of the basic principle in the law of agency that the agent of a known principal is not liable for the repayment of funds which he has transmitted to his principal. *Sadler* v. *Evans,* 4 Burr. 1984 (1766);

Bullar v. *Harrison,* 2 Cowp. 565 (1777); *East India Co.* v. *Tritton,* 3 B. & C. 280 (1824); *White* v. *Bartlett,* 9 Bing. 378 (1832); *Hooper* v. *Robinson,* 98 U. S. 528, 540–541 (1878); *Baldwin* v. *Black,* 119 U. S. 643, 647 (1887). While the general rule is that notice of the claim before transmission by the agent to the principal is sufficient to hold the agent, it appears to be settled that a public agent who is under a duty to pay the money over irrespective of opposing claims will not be held. As early as 1792 Lord Kenyon, in *Greenway* v. *Hurd,* 4 Term R. 553, 555, with specific application to a crown revenue agent, said:

> If the defendant had not paid the money over, he would have subjected himself to punishment; and it would be hard that he should also be punished by an action if he did pay it over.

See also *Horsfall* v. *Handley,* 8 Taunt. 136, 138 (1818).

When a test case was desired, the collector retained the money in his hands, with the consent of the Attorney General. *Campbell* v. *Hall,* 1 Cowp. 204 (1774). And in *Whitbread* v. *Goodsbank,* 1 Cowp. 66, 69 (1774), Lord Mansfield insisted that the record show a similar action was a consent suit, else "it might be of great inconvenience if this case should hereafter be made a precedent." [9]

In the United States this rule has been fully accepted and often applied by the Supreme Court. *Elliott* v. *Swartout,* 10 Pet. 137, was decided in 1836. At that time the collector was under no duty to pay into the Treasury taxes paid under protest. The Court held that illegal taxes paid under protest could

[9] These early cases seem still to be the law. The absence of more recent cases may be traced to the availability of special statutory remedies. See, for example, 8 & 9 Geo. V, c. 40, Secs. 147–151; 57 & 58 Vict., c. 30, Sec. 8 (12); 23 & 24 Geo. V, c. 36. It is significant that, in numerous cases attempting to bring a petition of right or mandamus to recover taxes (remedies conditioned upon the absence of another remedy), the courts have never suggested the availability of assumpsit. *The Queen* v. *The Commissioners,* 12 Q. B. D. 461 (1884); *Holburn Viaduct Land Co.* v. *The Queen,* 52 J. P. 341 (1887); *Commissioners* v. *Pemsel* [1891], A. C. 531; *Malkin* v. *King* [1906], 2 K. B. 886; *William Whitley, Ltd.* v. *Rex,* 127 L. T. 619 (1909); *Bristol Channel Steamers, Ltd.* v. *The King,* 40 T. L. R. 550 (1924).

be recovered from the collector, even though he had thereafter paid them into the Treasury, while taxes whose payment was not protested could not be recovered from the collector after payment into the Treasury.

The Court has many times reaffirmed the principle that there can be no common law action against a Collector for the recovery of taxes after he has paid them into the Treasury pursuant to his statutory duty, and that whatever remedy the taxpayer may have is solely the creation of the statute. *Nichols* v. *United States,* 7 Wall. 122, 126–127 (1868); *Barney* v. *Watson,* 92 U. S. 449, 452 (1875); *Arnson* v. *Murphy,* 109 U. S. 238, 240, 243 (1883); *Auffmordt* v. *Hedden,* 137 U. S. 310, 329 (1890); *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693 (1894). The reasons which compel this result are perhaps best stated in *Curtis's Administratrix* v. *Fiedler,* 2 Black 461, 478 (1862):

> *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. Such a promise, says the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law.

The decisions are unequivocal. Their principle, that there can be no common law action in assumpsit against the Collector for the recovery of taxes once paid into the Treasury, has been expressly stated by the Supreme Court in numerous cases extending over a period of almost a century.

We freely concede that, despite payment over, the Collector may be liable on the alternate theory for his own wrongful act if he acts outside the scope of his authority and collects, under the color of his office, taxes which are plainly unauthorized. See *In re Fassett,* 142 U. S. 479, 487 (1892); *De Lima* v.

Bidwell, 182 U. S. 1, 179 (1901); *Gonzales* v. *Williams,* 192 U. S. 1, 15 (1904); cf. *Passavant* v. *United States,* 148 U. S. 214, 219 (1893).

De Lima v. *Bidwell,* is the leading case on this theory of a collector's liability. There the Supreme Court decided that, after the passage of the Customs Administration Act, where a collector was sued to recover back an overpayment of money exacted as duties upon goods alleged never to have been imported at all, the common law right to sue the collector still existed. The theory of the case was that the collector did not act as an officer of the United States when he exacted duties with respect to goods which had never been imported and, hence, over which a collector could have no official jurisdiction. The Court took the position that in such a case the most that could be said of the collector's conduct was that he acted "under color of the revenue laws" and in such circumstances the revenue laws could afford no protection from suit against him individually. No more would his payment into the Treasury of money which he had no jurisdiction to collect afford a bar, especially since under R. S. 989 the judgment against him would be paid out of an appropriation from the Treasury. The Court distinguished *Arnson* v. *Murphy, Schoenfeld* v. *Hendricks,* and *Barney* v. *Watson, supra,* on the ground that those cases related to situations where there had been an admitted entry of the merchandise. Obviously, in such situations, the collector had not acted wrongfully since he had official jurisdiction to determine the amount of duty payable with respect to the entries and in collecting the duties acted in his official capacity even if his decision as to the amount to be assessed and collected was erroneous.

On either theory, however, the common law liability of a collector is personal, not official. The right of action is against him individually. *Sage* v. *United States,* 250 U. S. 33 (1919); *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1 (1921); *Union Trust Co.* v. *Wardell,* 258 U. S. 537 (1922). Its form is *indebitatus assumpsit,* on a promise implied in law based either upon the collector's continued possession or control of money mistakenly collected or upon his own wrongful act together with the doctine that in either situation he should, *ex aequo et bono,*

return the money collected. But such a promise, will be implied only where the collector has misinterpreted the law, or acted without authority of law to plaintiff's prejudice; and where, also, plaintiff has made due protest at the time of payment against the collector's action in order that the collector may have opportunity either to correct his action or to protect himself by withholding the money collected until his right to make the collection can be adjudicated. *Elliott* v. *Swartout,* 10 Pet. 137 (1836); *Bend* v. *Hoyt,* 13 Pet. 263 (1839).[10]

Plaintiff in the instant case has failed entirely even to attempt to bring itself within either theory. The complaint contains no allegation that the defendant collector unjustly detains the money nor, on the other hand, that he collected the taxes outside his official duties. In particular, plaintiff has failed to plead or prove that its payment to the deputy collector on December 24, 1940, was under any protest. On the contrary, the agreed facts show that the master filed an oath on entry showing the voyage to have begun at Talara and paid tax without protest at the 6-cent rate. Even when defendant had accounted for the collection and it was doubtless too late for him to accept a substitute oath and revise the assessment, no attempt was made by plaintiff to protest against the action as an individual wrongful act of defendant nor to advise him that it was plaintiff's intention to hold him individually liable. Plaintiff's only action was to apply to the Director for refund in accordance with the statutes and regulations. The regulations (*infra,* p. 54) make plain that protest against payment and any subsequent application for refund are distinct acts. Indeed, it was not until four months after the payment of December 1940 that defendant learned from plaintiff's letter of May 7, 1941, applying to the Director for refund, that plaintiff seriously contested the classification and rate of assessment. But even then, plaintiff's application to the Di-

[10] The indispensability of protest has been repeatedly emphasized. *Elliott* v. *Swartout, supra,* at 152; *Maxwell* v. *Griswold,* 10 How. 242, 255 (1850); *Union Pacific R. R. Co.* v. *Com'rs,* 98 U. S. 541, 544–546 (1878); *United States* v. *Cuba Mail S. S. Co.,* 200 U. S. 488, 494 (1906); *Dewell* v. *Mix,* 116 Fed. 664, 666 (1902, C. C. Conn.); see *Philadelphia* v. *Collector,* 5 Wall. 720, 731–732 (1866).

rector for refund is incompatible with any interpretation other than that plaintiff recognized and accepted the procedure set up in the regulations whereby defendant had no discretion but the Government itself, acting by the hand of the Director, its officer specially authorized thereto, was alone responsible for the rate of assessment contested by plaintiff.

In a case such as the present, the administrative procedure resulting from the provisions of section 3 of the Act of July 10, 1884, and section 26 of the Act of June 26, 1884, together with plaintiff's action in accepting and following without objection the steps prescribed in the regulations for invoking relief thereunder, entirely removed the matter of collection from the control of the defendant collector. Once the master gave, and the collector accepted, an oath on entry of the vessel which showed the voyage was from Talara, the collector became responsible under his bond for collecting and depositing tax at the 6-cent rate. Whatever might have been the case had plaintiff paid under protest and at once brought suit against the collector, by electing to follow the procedure prescribed by the regulations, plaintiff made the collector its mere instrumentality to effect deposit of the money into the Treasury. Plaintiff is now estopped to turn against the collector personally.

In this posture, accordingly, a suit against the collector can only be against him officially on account of his official acts and doings pursuant to the oath on entry of the vessel which was filed without protest. It cannot be based upon any personal wrong by the collector.[11] The collector's defense is not only that, on the one hand, he is required to turn over plaintiff's payment to the treasury and has done so, but that, on the other, in receiving the money voluntarily paid by plaintiff without protest he merely performed his ministerial duty and did not act wrongfully or violate plaintiff's rights since all that plaintiff could require of him was proper performance of that duty.

[11] Cf. *Anniston Mfg. Co.* v. *Davis*, 87 F. (2d) 773, 778–779 (1937, C. C. A. 5), aff'd 301 U. S. 337; *Haskins Bros.* v. *Morgenthau*, 85 F. (2d) 677, 683 (1936, App. D. C.), cert. den., 299 U. S. 588. The collector had no discretion to collect tax at the 2-cent rate on a voyage stated in the oath on entry to have begun at Talara, nor any authority to review the decisions of the Director or exercise any control over him and his interpretation of the law.

3. *No reason advanced by the plaintiff or the court below justifies departing from the established requirements for suit against the collector.*—In *DeLima* v. *Bidwell,* 182 U. S. 1, 176 (1901), the Court observed, "If there be an admitted wrong the Courts will look far to supply an adequate remedy." But no such problem is presented here. In the present matter, whether or not the courts are concluded by the decision of the Director concerning the interpretation of the law and the classification and rate of assessment applicable and are without jurisdiction to review it, plaintiff has the right to bring suit against the United States under the Tucker Act for any amount due him.[12] There is no reason to seek afar for a remedy nor to disregard the settled requirements for suit against the collector. Plaintiff's remedy for recovery of tonnage tax is ready to hand in a suit against the United States under the Tucker Act. *The Sophie Rickmers* (*Rickmers Rhederi, A. G.* v. *United States*), 45 F. (2d) 413 (1930, S. D. N. Y.); *Flensburger Dampfercompagnie* v. *United States,* 73 Ct. Cls. 646, 59 F. (2d) 464 (1932), cert. den. 286 U. S. 564; *Standard Oil Co.* v. *United States,* 77 Ct. Cls. 205, 2 F. Supp. 922 (1933), cert. den., 290 U. S. 632.

The conclusion of the court below that plaintiff could proceed by suit against the collector is palpably erroneous. It stems from an incorrect appreciation of the principle of cases such as *Border Line Transportation Co.* v. *Haas,* 128 F. (2d) 192 (1942, C. C. A. 9); *Cosulich Line* v. *Elting,* 40 F. (2d) 220 (1930, C. C. A. 2) and *DeLima* v. *Bidwell,* 182 U. S. 1, 179

[12] Act of March 3, 1887, as amended 28 U. S. C. 41 (20), 761–765; *Carriso Inc.* v. *United States,* 106 F. (2d) 707 (1939, C. C. A. 9); *Compagnie Generale Transatlantique* v. *United States,* 26 F. (2d) 195, 197 (1928, C. C. A. 2), aff'g 21 F. (2d) 465, 466. It is elementary that the need for suit may exist even where the Director has decided that an overpayment has been exacted. The power under 46 U. S. C. 3 of interpreting the tonnage laws and the power under 18 U. S. C. 643 of ordering repayment are not lodged in the same hands. See 19 Ops. A. G. 660, 665; 28 Ops. A. G. 21, 23. Even after a favorable decision by the Director, refund under 18 U. S. C. 643 might not be ordered, and, if ordered, payment might well be withheld by the General Accounting Office on account of a claim of set-off by the United States. See 31 U. S. C. 71, 74, 93. The direct means of suit against the United States is available whether or not the anomalous and circuitous procedure of suit against the collector may also be available. Cf. *United States* v. *Emery,* 237 U. S. 28, 31–32 (1915); *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 382 (1933).

(1901) cited by the Court, as well as of the purpose and effect of R. S. 989 (28 U. S. C. 842). The court below predicates its decision upon what it appears to regard as an established right to maintain an action against a collector for any part of any tax payment claimed not to be validly due. This we have seen (*supra*, p. 17) is opposed to, not supported by, *DeLima* v. *Bidwell*. The *Border Line* and *Cosulich Line* cases, like the *DeLima* case, involved situations where the issue was as to the collector's authority to impose any charge at all, not merely as to the classification and rate of assessment where something was admitted due.[13] This is the distinction which the Supreme Court carefully pointed out in the *DeLima* case between cases where the collector's individual liability rests upon his own wrong in acting under color of authority to collect duties where no jurisdiction to collect duty exists and cases, like the present, where the liability to payment is conceded but there exists a controversy concerning the classification and rate of assessment. Exactly the same distinction exists in the case at bar.

It is common ground that the *Montebello* made entry and that tonnage duty was payable on account thereof so that the only question plaintiff is seeking to litigate is the classification and rate of duty and the amount payable. It follows that the defendant collector, in exacting payment, acted within the jurisdiction conferred by the statute and in his official capacity as a government officer and not tortiously or under color of his office. He received the taxes legally and he cannot refund them even if he were to agree with plaintiff that the decision of the Director has erroneously interpreted the law and arbitrarily denied the refund. Unlike the situation in the *DeLima, Border Line,* and *Cosulich Line* cases, there was jurisdiction to impose tonnage tax and therefore jurisdiction for the Director to interpret the law and determine the classification and rate.

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[13] Incidentally it should be noted that all three cases expressly state that the plaintiff, unlike plaintiff here, had made proper and timely protest to the collector. See *DeLima* v. *Bidwell*, 182 U. S. at 2; *Border Line Transportation Co.* v. *Haas*, 128 F. (2d) at 192; *Cosulich Line* v. *Elting*, 40 F. (2d) at 221. Cf. *Royal Mail Steam Packet Co.* v. *Elting*, 66 F. (2d) 516, 518 (1933, C. C. A. 2); *Transatlantica Italiana* v. *Elting*, 66 F. (2d) 542, 544 (1933, C. C. A. 2).

Plaintiff's complaint may be against the Director or the United States but it is not against any personal action by the collector.[14]

The Director's decision is a complete protection to the collector in the same way that the decision of a court is a complete protection to the marshal. The Director's decision is no more void than is the judgment of a court when it has jurisdiction of the parties and the subject matter. Either may or may not be subject to further review by some other tribunal. Either, if reviewable, may, if erroneous, be subject to correction. But to hold the defendant collector liable would require holding his act to be individually wrongful, which in turn would involve the assertion of the right of the collector to disregard the decisions of the Director and thus substitute the collector instead of the Director as the final authority in such cases. Such a result is directly contrary to the express language and intent of section 3 of the Act of July 5, 1884, and would destroy all uniformity of interpretation and seriously obstruct the enforcement of the law and the collection of the revenue.

Nor will Revised Statutes 989 support the action against the collector. The supposition that R. S. 989 standing alone amounts to an authorization by the United States to be sued in the name of the collector, was definitely rejected in *United States* v. *Kales,* 314 U. S. 186, 197–200 (1941) and *United States* v. *Nunnally Investment Co.,* 316 U. S. 258, 262–264 (1942). Those cases finally set at rest all contention to that effect. In *Kales'* case the Court observed (at p. 199):

> Notwithstanding the provision for indemnifying the collector and protecting him from execution, the nature and extent of the right asserted and the measure of the recovery remain the same.[15]

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[14] The point was not made in the court below, but logically if the suit can be viewed as against anyone other than the United States, the Director is an indispensable party who has not been joined. The collector was his mere agent and subordinate in the matter, responsible to him and bound to abide by his instructions and decisions. Cf. *Guerich* v. *Rutter,* 265 U. S. 388, 391 (1924); *Webster* v. *Fall,* 266 U. S. 507 (1925); *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28 (1897); *Neher* v. *Harwood,* 128 F. (2d) 846 (1942, C. C. A. 9), cert. den. 317 U. S. 659.

[15] In *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1 (1921), holding no action lies against a collector for collections made by his predecessor, the court

In the absence of some other statute expressly granting a remedy by suit against the collector,[16] no action will lie except for his individual liability which still rests exclusively upon his continued possession of the funds or his individual responsibility for his own illegal acts committed either in his own discretion or under instructions which he was bound to recognize as unlawful because they exceeded the jurisdiction conferred by the statute or the statute was unconstitutional.

This conclusion is obvious from the plain language and the legislative history of R. S. 989. As we have seen, Congress, by the Act of 1845, reinstated the right to bring suit against the collector so far as concerned duties on merchandise. But, although the Government was bound to pay the judgments, collectors were still held subject to levy of execution in such suits[17] so that Congress, to protect them, provided by the Act

had already pointed out that R. S. 989 is not an absolute protection. The collector is still subject to the court's discretion in making the certificate under the Act. The action is therefore still personal and can be maintained only for his own wrongful act and is not converted into one in effect against the United States. The Court explains (pp. 4–5) : "To show that the action still is personal, as laid down in *Sage* v. *United States*, 250 U. S. 33, 37 [1919], it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case. It is not to be supposed that a stranger to an unwarranted transaction is made answerable for it; yet that might be the result of the suit if it could be brought against a successor to the collectorship. A personal execution is denied only when the certificate is given. It is true that in this instance the certificate has been made, but the intended scope of the action must be judged by its possibilities under the statutes that deal with it. The language of the most material enactment, Rev. Stats. sec. 989, gives no countenance to the plaintiff's argument. It enacts that no execution shall issue against the collector but that the amount of the judgment shall be provided for and paid out of the proper appropriation from the Treasury,' when and only when the Court certifies to either of the facts certified here, and 'when a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him, and by him paid into the Treasury, in the performance of his official duty.' A recovery for acts done by the defendant is the only one contemplated by the words 'by him.' The same is true of Rev. Stats., sec. 771, requiring District Attorneys to defend such suits."

[16] Cf. *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382 (1933), characterizing such statutes as anomalous now that the Tucker Act authorizes suit against the United States.

[17] *Knoedler* v. *Schell*, 14 Fed. Cas. No. 7, 889 (1861, C. C. N. Y.) ; S. Rept. 299, 36th Cong., 2d sess. [ser. vol. 1090].

of March 3, 1863, c. 76, § 12, 12 Stat. 741 (R. S. 989, 28 U. S. C. 842) that—

> When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

The conditional language shows it was not to impose additional liabilities on the collectors but solely as a further protection. Decisions of the Supreme Court have settled that the provision affords a collector, when found individually liable, full protection both where he has acted individually for probable cause (*DeLima* v. *Bidwell,* 182 U. S. 1, 176–179 (1901)) and where he has acted under the express direction of his superior (*Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 381–383 (1901)). But as before, once he has parted with the money the collector is only suable by statutory authorization or for illegal exactions by his own wrongful acts in exceeding the limits of his authority or in executing commands of his superiors clearly illegal on their face.[18] It does not, as the court below seems to have assumed, render the liability of the collector coterminous with that of the United States.

[18] Similarly it leaves unaltered the requirement that the payment be not only involuntary but under protest and in the absence of a statute expressly relieving plaintiff of the necessity of protest, as was the case in *Moore Ice Cream Co.* v. *Rose, supra,* the collector will only be liable where proper protest was made at the time of payment.

II. The determination of the director is final and conclusive as to the correctness of the assessment of tonnage tax

Even if suit would lie against the defendant collector the district court lacked jurisdiction to disregard the decision of the Director and try *de novo* a controversy involving the assessment, collection, and refund of tonnage taxes. Under the Act of 1884 the decision of the Director of the Bureau of Marine Inspection and Navigation upon plaintiff's application for refund of an alleged over-assessment is final and not subject to judicial review. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof and due process are open. The jurisdiction of the court is restricted and if these legal tests are satisfied the administrative determination is incontestable.

The apparent theory of plaintiff's case is that the determination of the Director can be ignored if suit is brought against the collector to recover the payment [19] rather than directly against the Director or against the United States to obtain the refund which the Director denied in accordance with his interpretation of the statute. Nowhere in the complaint (R. 2–5) is the application for refund or the Director's denial mentioned, unlike the *North German Lloyd* and *Laidlaw* cases where the plaintiff expressly sought review of the administrative decisions under R. S. 2931. The reason of this procedure appears to be a contention that section 24 of the Judicial Code (28 U. S. C. 41 (5)) confers jurisdiction of suits involving tonnage revenue and that in a suit against the collector, a third party, the mere expression of finality of decision by the Director should not imply a limitation upon the jurisdiction of the court to examine the question *de novo*.[20]

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[19] We have already pointed out (*supra*, pp. 18 and 21 note 13) that plaintiff forestalled itself in this regard by paying without protest so that in law the payment must be deemed voluntary.

[20] The opinion of the court below (R. 52–53) seems to indicate a belief that the parties were divided on the question of jurisdiction of the action itself rather than the limits of the court's jurisdiction to reexamine *de novo*

The substance of this astounding proposition seems to come down to a notion that the Director's decision may be ignored in a collateral attack, even though if directly challenged it would be conclusive unless beyond his statutory authority, arbitrary or unsupported by evidence. This argument that an administrative decision has *less* weight in a collateral than in a direct attack apparently seeks to reverse the usual rule against collateral attack upon administrative or judicial proceedings alike. Such a position is plainly untenable under decisions involving other administrative bodies. Cf. *Adams* v. *Nagle,* 303 U. S. 532, 540 (1938); *Butte, A. & P. Ry. Co.* v. *United States,* 290 U. S. 127, 136 (1933); *Cragin* v. *Powell,* 128 U. S. 691, 698 (1888); and consider generally *Yakus* v. *United States,* 321 U. S. 414, 433 (1944).

Although our primary position is that the determination of the Director is binding upon the courts in every case unless it exceeds his statutory authority or is arbitrary and capricious, it may also be suggested that, by reason of the peculiar language of section 3 of the Act of 1884, the scope of judicial review of the Director's determination may be even more restricted than in many situations dealt with in the reported cases under other statutes. Section 3 does not confine the Director to the finding of facts but expressly declares his decision final on "all questions of *interpretation* growing out of the execution *of the laws*" relating to the collection of tonnage tax. It would seem that Congress intended thereby to extend his duty and authority to the weighing of the circumstances with a view to reaching a conclusion as to the character of a vessel's voyage in the light of the dominant characteristics of the maritime operations in which the vessel is engaged, even though in some situations this could be deemed a question of law.

1. *The cases of Cary* v. *Curtis and North German Lloyd* v. *Hedden fully establish that the court had no jurisdiction to*

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the point determined by the Director. Obviously the fact that Congress continues the jurisdiction of the court with respect to actions concerning tonnage duties can not indicate that its jurisdiction to review the administrative decision does not continue to be limited to determining whether constitutional and statutory authority were exceeded and due process observed.

examine the case de novo.—In *Cary* v. *Curtis,* 3 How. 235 (1845), the Supreme Court of the United States held that Congress might validly constitute the Secretary of the Treasury the sole tribunal for the examination of claims for duties said to have been improperly paid. There the Act of 1839 (c. 82, 5 Stat. 348) directed collectors to pay into the Treasury all duties (including tonnage duties) collected whether under protest or not and provided, "whenever it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of * * * duties paid under protest, more money has been paid to the collector * * * than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment." Despite the statute, suit was brought against the collector and the circuit court certified the matter for decision by the Supreme Court. The Supreme Court held the provision valid under the long-established rule that in matters of fiscal concern governments may resort to summary administrative process and thereby withdraw jurisdiction for judicial review of the administrative determination from the courts.[21] Said the Court (pp. 242, 245–246):

> It will not be irrelevant here to advert to other obvious and cogent reasons by which Congress may have been impelled to the enactment in question; reasons which, it is thought, will aid in furnishing a solution of their object. Uniformity of imports and excises is required by the Constitution. Regularity and certainty in the payment of the revenue must be admitted by every one as of primary importance: they may be said almost to constitute the basis of good faith in the transactions of the government; to be essential to its practical existence. * * * We have no doubts of the objects of the import of that act; we cannot doubt that it constitutes the Secretary of the Treasury the source whence instructions

[21] Cf. *Auffmordt* v. *Hedden,* 137 U. S. 310, 324 (1890); *Hilton* v. *Merritt,* 110 U. S. 97, 107 (1884); *Springer* v. *United States,* 102 U. S. 586, 593–594 (1880); *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 282 (1855). See cases and other authorities collected by Brandeis, J. in *Phillips* v. *Commissioner,* 283 U. S. 589, 594–595 (1931).

> are to flow: that it controls both the position and the conduct of collectors of the revenue. * * * has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid. * * * In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the government in whom the rights of that government should be represented in any conflict which might arise, and to prescribe the manner of trial. It is not imagined, that by so doing Congress is justly chargeable with usurpation, or that the citizen is thereby deprived of his rights. There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as the public law. * * * The courts of the United States can take cognisance only of subjects assigned to them expressly or by necessary implication; *a fortiori,* they can take no cognisance of matters that by law are either denied to them or expressly referred *ad aliud examen.*
>
> But whilst it has been deemed proper, in examining the question referred to by the Circuit Court, to clear it of embarrassments with which, from its supposed connection with the Constitution, it is thought to be environed, this court feels satisfied that such embarrassments exist in imagination only and not in reality: that the case and the question now before them present no interference with the Constitution in any one of its provisions.

The question of the effect and constitutionality of such provisions was thus put at rest a hundred years ago and the rule of this great foundation case of *Cary* v. *Curtis* has since been consistently accepted. See *Ex parte Bakelite Corp.,* 279 U. S. 438, 458 (1929); *Fong Yue Ting* v. *United States,* 149 U. S. 698, 714–715 (1893).

Until the enactment of section 14 of the Act of 1864 (see *supra,* p. 10), the regime of the Act of 1839 provided the only remedy for recovery of overpayment of tonnage tax. *Cary* v. *Curtis* was itself directly applicable. Section 2 of the Act of July 5, 1884, c. 221, 23 Stat. 119, as amended (46 U. S. C. 3, appendix, *infra,* p. 53), the statute here involved, marked a return to this same regime after the interval under the Act of 1864 which permitted the court review. It differs from the Act of 1839 involved in *Cary* v. *Curtis* principally in providing more explicitly the finality to be accorded the administrative decision. It charges the Director with supervision of the tonnage laws and provides in substance that, "on all questions of interpretation growing out of the execution of the laws relating to the collection of tonnage tax and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

The language and the internal economy of the provision follows closely that in R. S. 2930, providing for reappraisement of merchandise in the event of the importer's dissatisfaction and directing that "the appraisement thus determined shall be final and be deemed to be the true value." [22] Under R. S. 2930 the expression "shall be final" had an established meaning in 1884 when Congress followed it in framing the new Act. It excluded all possibility of a trial *de novo.* It was settled that except for questions of statutory authority, fraud, and irregularity, the decision of the appraisers was conclusive and no jurisdiction for review existed under R. S. 2931, which gave the right of appeal to the Secretary of the Treasury, when duties were alleged to have been illegally or erroneously exacted and the right of judicial review in the event of an adverse decision by the Secretary. *Hilton* v. *Merritt,* 110 U. S. 97, 104 (1884);

[22] Where, on the contrary, finality was to be confined to the executive branch of the Government and the courts left with jurisdiction to review the determination of the administrative authority, the law makers were at pains to say so plainly. Cf. R. S. 191, providing: "The balances which may from time to time be * * * certified to the heads of departments by the Commissioner of Customs, or the Comptrollers of the Treasury, * * * shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts."

Bartlett v. *Kane*, 16 How. 263, 272 (1853).[23] The bill resulting in the Act of 1884 was a reorganization measure intended to simplify and consolidate in a single bureau the duties respecting navigation and tonnage taxation.[24] It appears obvious, therefore, that Congress in providing that the interpretations of the chief of the new navigation bureau "shall be final" intended to give to his determinations relating to the collection of tonnage tax the same finality and freedom from review by the Secretary and the courts which that form of words had been held to give determinations by the appraisers respecting the valuation of merchandise.[25]

But aside from the plain meaning of its express terms and their legislative origin, in no event can the effect and validity of section 3 of the Act of 1884 be regarded as a novel question. A test case, for the very purpose of determining the authority granted by section 3 was brought by agreement between the

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[23] Accord, *Oelbermann* v. *Merritt*, 123 U. S. 356, 361 (1887); *Passavant* v. *United States*, 148 U. S. 214, 219–220 (1893), decided subsequent to 1884. For a summary of the situations which had been held subject to examination by the courts, see *Auffmordt* v. *Hedden*, 137 U. S. 310, 328 (1890); *Muser* v. *Magone*, 155 U. S. 240, 247 (1894).

[24] See H. Rept. 281, 48th Cong., 1st sess. [serial vol. 2253], 15 Cong. Rec. 3194.

[25] There was no question in the mind of the first Commissioner of Navigation that this was its effect. In his *Annual report for the year ending June 30, 1885*, the first full year of the Bureau's existence, he stated (p. 4): "It is found that the business of these various branches, so closely allied, can be more economically and much better done under the present consolidation than under the old system, which divided it among several bureaus *and numerous courts*, and in certain cases caused a duplication of the work as well as some lack of harmony." [Italic supplied.] Similarly in Short, *Bureau of Navigation, its history, activities, and organization*, (Institute for Government Research: Service Monograph No. 15: 1923) it is stated (p. 46): "The Attorney General has ruled and the courts have sustained the contention that the decisions of the Commissioner in respect to these matters [collection and refund to tonnage tax] cannot be reviewed by the courts or the executive [citing 18 Op. A. G. 197; 43 Fed. 17]."

The authority was confined, however, to "questions of interpretation growing out of the execution of *the laws*" relating to the collection of tonnage tax. The interpretation of treaties may not be included and remained subject to the joint control of the Secretary and the Attorney General in accordance with the Act of June 19, 1878, c. 318, 20 Stat. 171, amending R. S. 2931, until the repeal of the latter by the Customs Administration Act, 1890, See the Government's position in the German treaty cases, *infra*, note 27, p. 34.

Government and the steamship companies and was decided May 21, 1890 by the Circuit Court for the District of New Jersey in *North German Lloyd S. S. Co.* v. *Hedden*, 43 Fed. 17. The Government regarded the matter as controlled by *Cary* v. *Curtis* and filed no brief (see *supra*, p. 11.) Counsel for the steamship companies, however, vigorously urged that the statute was invalid (43 Fed. at 20, 23). After trial on the merits and careful consideration, the circuit court agreed that *Cary* v. *Curtis* was controlling. The court observed (p. 25):

> It was perhaps unnecessary, in view of *Cary* v. *Curtis*, and *Sheldon* v. *Sill*, that I should have done more than acquiesce in the doctrines there announced, and support the validity of the act of July 5, 1884, without further discussion, but the large amount of money involved in the present actions, and the earnestness and force with which the plaintiff's claims have been pressed, have induced me to make a more extended presentation of them than was a first designed. * * * Neither is the court required to say whether the commissioner of navigation is or is not correct in his interpretation of the law. Congress has seen fit to constitute him the final arbiter in certain disputes, and congress alone can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due.

Accordingly the court held that any right given by R. S. 2931 to sue for overpayments of tonnage duty was taken away by section 3 of the Act of 1884 and the power to determine controversies arising therefrom given exclusively to the Commissioner of Navigation (now the Director, Bureau of Marine Inspection and Navigation).

The shipping interests acquiesced in this decision and no appeal was ever taken. On the contrary, as pointed out (*supra*, p. 11), Congress by the Customs Administration Act, 1890 (c. 407, 26 Stat. 131), thereupon repealed R. S. 2931, providing for suit against the collector in tonnage tax cases, and established a new procedure which confined judicial review to certain specified situations involving customs duties and excluded tonnage questions.

Indeed, the failure to appeal is not surprising. We know of no objections which can reasonably be raised to the procedure of the remedy provided for collection and refund of tonnage tax. If any there be, they may be answered by reference to the general principles which control any question of due process in the procedural sense. The term "due process" was borrowed from the English "law of the land" (*Davidson* v. *New Orleans,* 96 U. S. 97, 101 (1877)), and does not necessarily mean judicial process (*Public Clearing House* v. *Coyne,* 194 U. S. 497, 509 (1904); *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272 (1855)); nor does it mean any particular kind of proceeding (*Insurance Co.* v. *Glidden Co.,* 284 U. S. 151 (1931)). The due process clause of the fifth and fourteenth amendments merely requires that the federal and state governments shall not deprive one of his property or liberty without such notice and hearing as is commensurate with the necessities of the case and the character of the rights affected. *Buttfield* v. *Stranahan,* 192 U. S. 470, 496–497 (1904); *United States* v. *Ju Toy,* 198 U. S. 253 (1905); *Chicago, Burlington &c. R. R.* v. *Chicago,* 166 U. S. 226 (1897); *Phillips* v. *Commissioner,* 283 U. S. 589 (1931). Moreover, the Supreme Court has repeatedly held that there is no denial of due process when a state provides only an administrative hearing by which to determine the assessment and amount of taxes due. *Londoner* v. *Denver,* 210 U. S. 373 (1908); *Pittsburgh Ry.* v. *Board of Public Works,* 172 U. S. 32 (1898); *Davidson* v. *New Orleans,* 96 U. S. 97 (1877); *Kelly* v. *Pittsburgh,* 104 U. S. 78 (1881). The same principle applies here.[26]

[26] See the brilliant discussion of the point by Emmons, Ct. J., in *Pullan* v. *Kinsinger,* 20 Fed. Cas. No. 11,463 at pp. 48–50. As the court observed in *Cheatham* v. *United States,* 92 U. S. 85, 88 (1875): "All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them. These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose." *Auffmordt* v. *Hedden,* 137 U. S. 310, 324 (1890); *Earnshaw* v. *United States,* 146 U. S. 60, 69 (1892). Moreover, the Government may prescribe the conditions attending the admission of vessels, goods and immigrants into its ports. Accordingly, as one of those, it may make the decision of an administrative officer final. Cf. *Auffmordt* v. *Hedden, supra,* at 329; *Oceanic S. Navigation Co.* v. *Stranahan,* 214 U. S. 320, 340 (1909).

The court below, however, refused to follow *Cary* v. *Curtis,* and *North German Lloyd* v. *Hedden.* As its justification for disregarding the plain language of section 3 of the Act of 1884 and departing from the principles established by those cases, the court refers to *Laidlaw* v. *Abraham,* 43 Fed. 297 (1890, C. C. Ore.). That case was an opinion by a trial judge overruling the Government's demurrer to a complaint against the collector under R. S. 2931 for refund of tonnage dues. As we have stated (*supra,* p. 12), the facts of the case were such that when evidence thereof was submitted to the Commissioner of Navigation refund was ordered and the court entered a nonsuit, significantly, with costs against the plaintiff.

The insufficient consideration given the question by the Oregon court is obvious from its opinion. No reference is made to the corresponding provision of R. S. 2930 and the decisions of *Hilton* v. *Merritt,* 110 U. S. 97, 104 (1884), and *Bartlett* v. *Kane,* 16 How. 263, 272 (1853), thereunder. No consideration is given to the principles laid down in *Carey* v. *Curtis* which had been applicable to tonnage tax cases until 1864. The decision in *North German Lloyd* v. *Hedden,* handed down four months before, is also ignored. The court confines itself to observing (pp. 299–300):

> At first blush it may appear that this provision in the act of 1884 repealed so much of sections 2931, 3011, Rev. St., as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department. * * * In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to sidetrack into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by collectors. The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is "final" in the department, as it would not be but for this provision of the statute. This being so, and nothing appearing to the contrary, it follows that the right of action given to the

> unsuccessful appellant in such cases is not taken away * * * And, even if it were plain that congress in the passage of this act intended to deprive the plaintiff of all redress in the courts, might he not in good reason claim that the act is so far unconstitutional and void, as being contrary to the fifth amendment, which declares that no person shall be deprived of his "property without due process of law"? The demurrer is overruled.

The court below, however, despite this offhand manner of the Oregon court in disposing of the Government's demurrer and the circumstance that upon proof of the facts alleged plaintiff was plainly entitled to and in fact obtained administrative refund, takes the position (R. 52) that the Government's failure to allow the *Laidlaw* case to proceed to final judgment and, if the judgment were adverse to appeal therefrom, gives rise to an inference that the Government accepted the opinion as overruling the earlier *North German Lloyd* case.[27]

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[27] The court below also attempts to find support for this view in the opinion of Attorney General Miller (20 Op. A. G. 368), stating that *Laidlaw* v. *Abraham* is the only decision holding contrary to his own opinion in 19 Op. A. G. 661 and to that of Attorney General Garland in 18 Op. A. G. 197, that courts as well as Congress may overturn determinations of the Commissioner of Navigation. But this is indubitably correct and it is not understood why by stating that fact Mr. Miller should be taken as implying that his previous opinion was in error and that the courts have such power. Indeed the opinion is specific that congressional action is necessary, although the question was that of the interpretation of a treaty, no suggestion is made that the claimants might resort to the courts.

The files of the Department of Justice disclose that in the next case involving the question, *United States ex rel. Pacific Coast S. S. Co.* v. *Chamberlain, Commissioner of Navigation*, No. 50, 965 Law, In the Supreme Court of the District of Columbia, the Government relied upon *North German Lloyd* v. *Hedden*. On demurrer to the defendant's answer to plaintiff's petition for mandamus, Stafford, J., entered a memorandum of opinion on December 4, 1908 as follows: "I am of opinion that the authority of the Commissioner of Navigation in the premises, under section 3 of the act of July 5th, 1884, was exclusive, and his decision final, both as to matters of fact and matters of law, and consequently that this court is without authority to direct his action herein. Accordingly the demurrer to the answer will be overruled and the answer adjudged sufficient." An appeal was taken by the steamship company but was subsequently dismissed.

Since the *Pacific Coast* case, until the case at bar and its two companion cases were filed, no further suits for refund of tonnage tax appear to have

The vice of the decision in *Laidlaw* v. *Abraham* and of that of the court below alike is found in the view that the grant of power to an administrative authority to decide finally the issues raised in the course of its administration and to interpret with binding effect the laws covering the subject of that administration, is of doubtful constitutionality. Both courts assume that such a grant of power should be regarded as denying the citizen his property without due process of law. Accordingly, both labor to confine the effect of the word "final" to the internal economy of the authority itself. Thus the decision in *Laidlaw* v. *Abraham* seeks to refine away the words "shall be final" by arguing that the Act of 1884 did not specifically take away the right of suit provided by R. S. 2931. But at the time when Congress had spoken it had never been suggested that R. S. 2930, making the determination of the appraisers final, should be thus read together with R. S. 2931 with the result that the courts might substitute their decisions for that of the appraisers. In R. S. 2931 as in R. S. 2932, Congress provided for an appeal from the collector to the Secretary of the Treasury and authorized suit within a certain time if the Secretary's decision were adverse to the claimant. Those provisions are specific as to the whole procedure, including suit. In section 3 of the Act of 1884, as in R. S. 2930, no provision for suit is included. No more reason exists for implying one in section 3 than in R. S. 2930.

The Act of 1884 created a new bureau and transferred the decision of matters affecting tonnage tax from the Secretary of the Treasury to the Commissioner of Navigation; appeal was to be taken from the collector to the commissioner, not, as theretofore, to the Secretary. Under R. S. 2931 and 2932 Congress provided that the decision of the Secretary "shall be final unless suit shall be brought" within a certain time. Under R. S. 2930 and section 3 of the new law Congress spe-

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been instituted except the German treaty cases. The *Sophie Rickmers* (*Rickmers Rhederi, A. G.* v. *United States*, 45 F. (2d) 413 (1930, S. D. N. Y.); *Flensburger Dampfercompagnie* v. *United States*, 73 Ct. Cls. 646, 59 F. (2d) 464 (1932), cert. den., 290 U. S. 632. *Standard Oil Co.* v. *United States*, 77 Ct. Cls. 205, 2 F. Supp. 922 (1933), cert. den. 290 U. S. 632. As those cases involved the interpretation of treaties and not of laws, there was no place for the operation of section 3 of the Act of 1884. See *supra*, note 25; but cf. 20 Op. A. G. 368, 370; 18 Op. A. G. 197, 199.

cifically says that the decision of the commissioner "shall be final"; in neither section did Congress qualify its declaration by any proviso that suit be brought within a certain time as it did in R. S. 2931 and 2932.

The argument of the *Laidlaw* case is unconvincing for yet another reason. The appeal under section 3 by its express terms is from the collector to the commissioner. If the Oregon court is correct and in addition it is to be regarded as substituting the commissioner for the Secretary in R. S. 2931 and preserving the procedure there prescribed, the result is that there is a further appeal from the decision of the commissioner under section 3 to a second decision by the commissioner, substituted for the Secretary, under R. S. 2931. This would appear to demonstrate the impossibility of such a construction. But whatever the situation at the time the *Laidlaw* case arose, Congress in 1890 repealed R. S. 2931 so that when the instant case came before the court below it would not, as did the court in the *Laidlaw* case, construe section 3 of the Act of 1884 together with R. S. 2931. As 46 U. S. C. 3, section 3 of the Act of 1884 now stands alone and leaves the decision on the administrative appeal subject to no judicial review.

It is submitted, therefore, that this court should follow the decisions in *Cary* v. *Curtis, Hilton* v. *Merritt,* and *North German Lloyd* v. *Hedden,* and should disregard the *Laidlaw* case. Not only does the latter stand alone and unsupported by any other known decision, reported or unreported, but the opinion shows that the court was impelled to its conclusion by the belief that otherwise interpreted section 3 would be unconstitutional: a belief which we have seen is plainly erroneous.

2. *The Director's decision if it has warrant in the record and a reasonable basis in law is conclusive on the court.*—The administrative record in this case shows that the proceedings before the Director satisfy the fair hearing requirement. Plaintiff took its administrative appeal and argued on the basis of two prior decisions of the Director that the amount demanded by the collector was excessive and unlawful. The Director issued a reasoned opinion (R. 21–23) which distinguished the cases cited by plaintiff and a copy was duly communicated to plaintiff (R. 43) and no demand was made for a rehearing nor

for oral argument. The district court in its opinion (R. 47) refers to the circumstance that it appears by affidavit of the Director (R. 29) that any party in interest to a matter involving the payment of tonnage taxes may obtain, upon request, an opportunity to present orally before the Director or one of his assistants any statement or argument which he may care to make, but that plaintiff and its representatives were not so advised.[28] But this implied objection cannot be raised to the dignity of a challenge for want of due process. It is settled that in the absence of statutory requirement an opportunity for statement of a party's views and contentions is sufficient. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 317 (1933); *Origet* v. *Hedden,* 155 U. S. 228, 238 (1894); *N. L. R. B.* v. *Bottany Mills,* 106 F. (2d) 263, 265 (1939, C. C. A. 3).

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[28] No mention of a right to oral argument nor to rehearing is contained in 46 Code of Fed. Regs. 3.6, the regulation relating to the procedure for refund of tonnage duty. *Infra*, appendix, p. 54. The procedure relating to the collection and refund of tonnage tax was summarized by the staff of the Attorney General's Committee on Administrative Procedure as follows: "When a vessel subject to this tax comes into port, the collector computes the amont of the tax and presents a bill. The vessel is denied clearance until the prescribed amount has been paid. If the vessel's owner or master is aggrieved, he may pay under protest and assert a claim for refund, in which event a letter of protest and a letter of the collector are sent to the Bureau for its decision. Approximately 50 protests are filed annually. A member of the Bureau's staff prepares a draft of a letter to the collector, deciding the case. This letter is reviewed by an Assistant Director and by the Director. Very seldom does either the Assistant Director or the Director make substantial changes in the letter as first drafted. The questions presented are almost invariably questions of statutory interpretation and application of the statutory provisions to the facts of particular cases. Disputes of fact are virtually nonexistent; therefore no opportunity to present evidence is necessary. Furthermore, the nature of the questions is such that argument may be as well presented in writing as orally. The letters of decision present reasons, and opportunity is afforded for supplemental protests, although supplemental protests are very rarely made. The only questionable feature of the present practice with respect to collection of tonnage taxes is the apparent lack of any effective method of reviewing collectors' decisions which are favorable to vessels. Decisions unfavorable to taxpayers are reviewed, and accounts of collections are, of course, audited, but no independent inquiry is made into the question whether or not a collector may have erroneously decided a question of interpretation in favor of a vessel." (S. Doc. 186, 76th Cong., 3d sess., part 10, "Department of Commerce, Bureau of Marine Inspection and Navigation," p. 35).

Plaintiff's dissatisfaction was not with the administrative procedure but with the result thereof. Even there plaintiff's objections are restricted: neither plaintiff nor the court below questions the Director's view of the basic facts in this case. It is common ground to all concerned that the voyage of the *Montebello* was from Southern California to South America to British Columbia and back to Southern California, and that she had shipped her crew on articles for just such a voyage.[29] Plaintiff's objection to the Director's decision runs only against his final conclusion of fact, that in the circumstances of the basic facts agreed to by all, the *Montebello* was engaged in the long-voyage trade and entered from Talara, Peru, and not in the short-voyage trade entering from Vancouver, British Columbia.

The court below substituted its decision on the point for that of the Director purely because it had concluded as a matter of law that the finality conferred upon the Director's decision by section 3 of the Act of 1884 was limited to the executive branch of the Government. It correctly held (R. 54) that "Determination of the port from which the *Montebello* originated for the purpose of the tax involved is a question of fact." Plaintiff may urge in this court, however, that, because the basic evidentiary facts are undisputed and the controversy concerns the inference to be drawn from them, the issue is one of law which courts may decide for themselves without regard to the administrative decision. This contention has been advanced in a number of recent cases but it has not found favor with the Supreme Court. *Gray* v. *Powell*, 314 U. S. 402 (1941); *Shields* v. *Utah-Idaho R. R. Co.*, 305 U. S. 177 (1938); *United States* v. *Louisville & N. R. R. Co.*, 235 U. S. 314 (1914). In the latter case the court stated (at 320–321):

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[29] As the stipulation of agreed facts (R. 39–44) is substantially in accord with the administrative record before the Director (R. 7–29), defendant-appellant's action in acquiescing to the stipulation and failure to insist upon the case being considered only on the administrative record is of no importance. The law is settled, however, that since any review by the court cannot be by a trial *de novo*, only the administrative record should be considered. *Shields* v. *Utah-Idaho R. R. Co.*, 305 U. S. 177, 185 (1938); *Acker* v. *United States*, 298 U. S. 426, 434 (1936); *Tagg Bros.* v. *United States*, 280 U. S. 420, 443–444 (1930).

> the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. * * * It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

The view was reaffirmed in *Gray* v. *Powell* as follows (314 U. S. at 412):

> * * * Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director [Citations]. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.

The Supreme Court has consistently given effect to the administrative judgment in cases like that now at bar. But it has on various occasions apparently interchangeably labeled the issue as "fact" (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665 (1926)), "ultimate fact" (*Dobson* v. *Comm'r,* 320 U. S. 489, 501 (1943)), "ultimate conclusion" or "inference of fact" (*N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 130 (1944)), "factual inferences and conclusions" (*Commissioner* v. *Scottish American Inv. Co.,* 323 U. S. 119, 124 (1944)), or as a "mixed question of law and fact" (*I. C. C.* v. *Union Pac. R. R.,* 222 U. S. 541, 547 (1912); cf. *United States* v. *Idaho,* 298 U. S. 105, 109 (1936); *Dobson* v. *Comm'r,* 320 U. S. 489, 501 (1943)). More recent pronouncements use the formula of "warrant in the record and a reasonable basis in law" (*N. L. R. B.* v. *Hearst Publications, supra,* at 131) or require that there be "a rational basis" for the administrative conclusion (*Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146 (1939)).

The *Dobson* and *Scottish American* cases indicate that the administrative decision, whether called "factual inferences and conclusions," "ultimate fact" or "mixed," is not to be treated as one of "law" unless "the elements of a decision can be so separated "as to identify a clear-cut mistake of law" (320 U. S. at 502). This approach was adopted in one of the earliest cases involving a dispute as to the precise limits of judicial review. In *Bates & Guild Co.* v. *Payne,* 194 U. S. 106 (1904), in passing upon a decision of the Postmaster General, the Supreme Court said (p. 108):

> * * * where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. * * * where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive.

The different modes of statement, which probably vary with the linguistic preferences of the individual opinion writers, all express this same thought.

The present question of the interpretation of the tonnage statute does not differ from those considered in *Gray* v. *Powell, Shields* v. *Utah Idaho R. R. Co., Rochester Telephone Corp.* v. *United States,* and *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251 (1940). See also *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 400 (1940). The issue here is whether on undisputed facts the Director correctly concluded that the Montebello was "entered from" Talara rather than Vancouver. The issue in *Gray* v. *Powell* was whether on undisputed facts the Director of the Bituminous Coal Division had correctly concluded that a railroad was a "producer" within the meaning of the Bituminous Coal Act; in the *Shields* case whether a railroad was an "interurban" within the meaning of the Railway Labor Act; in the *Rochester Telephone* case whether one

company was under the "control" of another within the meaning of the Communications Act; and in the *South Chicago* case whether an employee was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act.

In each cited case the Supreme Court recognized that the question as to whether particular facts brought a person within statutory language was a matter of judgment and discretion on which the decision of the administrative official was to be accepted, if supported by the record, and that such questions of administrative judgment were not to be treated as pure matters of law for purposes of judicial review. In the *Shields* case the Court declared that the determination as to whether the carrier was "interurban" "was one of fact" (305 U. S. at 181). In the *Rochester Telephone* case the Court declared that whether one company had obtained "control" of another within the meaning of the Communications Act presented "an issue of fact" (307 U. S. at 145). And in the *South Chicago* case the Court refused to treat the issue of whether an employee was a member of a crew as presenting a mere question of law (309 U. S. at 258). In its opinion in the *Sunshine* case the Court, citing the *Shields* case and foreshadowing the *Gray* case, indicated the principle applied to proceedings for exemption under the Coal Act, referring to "the determination of the *question of fact* whether a particular coal producer fell within the Act" (310 U. S. at 400). [Italics supplied.]

The establishment by Congress of an administrative authority with power to determine a particular question manifests a legislative intention to take advantage of the expert judgment of a body "informed by experience" in the designated field. *Tulsidas* v. *Insular Collector,* 262 U. S. 258, 265 (1923); *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 130 (1944); *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454 (1907). There is no difference in this respect between the skill of employees in a bureau of a department advising and assisting its director and those in a board or commission. *Gray* v. *Powell,* 314 U. S. 402, 412 (1941). Decision in the instant case, for example, requires a background knowledge of the manner in which the shipping industry operates

and of the routes and trades customarily worked by tankers. Determination of the port from which the vessel entered within the meaning of the tonnage statute, when in fact the vessel entered from both ports, necessitates an understanding of the dynamics of the shipping industry and an appreciation of the many different ways in which vessels may be operated. In addition to a knowledge of the general purpose of Congress in adopting the tonnage statute it requires an intimate understanding and appreciation of the industrial details which led Congress in 1884 to grant the particular reduction provided and the trained ability necessary to foretell the effect of the imposition here adopted upon the attainment of the congressional objective. It is, in short, a matter in which the "feel of judgment" is important. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 366 (1940). Such a determination, we submit, is one for an expert administrative tribunal equipped to bring together the interrelated fragments of the picture, and not by a court, experienced in the law generally but without intimate grasp of the industrial and economic details which make up the shipping industry and form the background of the tonnage statutes.

For these reasons, when Congress, as it did here, empowers an administrative authority to decide a question finally, it must be assumed that Congress intends that the matter be submitted to the judgment and discretion of a trained group of specialists rather than to a court. Insofar, therefore, as a determination calls for the exercise of judgment and discretion in the interpretation of the statute, the administrative decision should be accepted by the courts irrespective of whether based on facts in evidence or in familiarity with the legislative and practical setting of the statutory provision involved. But this does not mean that the conclusions of an administrative authority are final on one type of question any more than on the other. The determination of the administrative body must have "warrant in the record" and a reasonable basis in the law. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146 (1939); *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 131 (1944). Just as an administrative decision which is unsupported by substantial evidence has no rational basis in fact, so an admin-

istrative decision which is plainly unreasonable in the light of express statutory language or other convincing evidence of legislative intention has no foundation in law.[30] In either event however, "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp* v. *United States, supra,* at 146; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287 (1934); *Swayne & Hoyt, Ltd.,* v. *United States,* 300 U. S. 297, 303 (1937); cf. *Gray* v. *Powell,* 314 U. S. 402, 412 (1941). As the court observed in *Commissioner* v. *Scottish American Inv. Co.,* 323 U. S. 119, 124 (1944), "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable." Cf. *Walker* v. *Altmeyer,* 137 F. (2d) 531, 533–534 (1943, C. C. A. 2).

3. *The Director's decision is supported by evidence in the record and has a reasonable basis in point of law.*—Considered in the light of the economics of the shipping industry there can be no doubt that the Director's decision finds ample warrant in the record. The American shipping trades are divided logically into the coasting trade, the short-voyage trade with the ports of North and Central America (in effect but an international coasting trade), and the long-voyage trade with other foreign ports. Typically a vessel in the short-voyage trade takes cargo out to a port or ports in North or Central America and returns to its home port in a short time. The vessel in the long-voyage trade takes its cargo out to a South American, European, or Asiatic port and is gone for many weeks, perhaps for months. The vessel in the short-voyage trade enters frequently and may be taxed accordingly, the long-voyage vessel enters less frequently and offers fewer oppor-

[30] Thus, if the language of the statute or its legislative history manifests a specific legislative intention as applied to a particular state of facts, it would be abritrary for an administrative body to give the statute a different meaning. But if legislative intention appears only in broad outline without reference to a specific state of facts, there would be legitimate room for administrative discretion in determining how the Act applied in a particular situation.

tunities for taxation. The several rates of taxation under the American tonnage laws are divided accordingly, into the same three classes: the coasting trade is free from tonnage duties (46 U. S. C. 122) and is reserved to vessels of the United States; the foreign trade is subject to taxation: the short-voyage trade at 2 cents per ton, the long-voyage trade at 6 (46 U. S. C. 121). The tax is imposed on a vessel's first entry within a year at a United States port; afterwards she may call at as many other United States ports as she chooses without paying additional tax until she calls at a foreign port.

Obviously so long as a vessel remains within the short-voyage limits she does not expose herself to taxation at the long-voyage rate. But when a vessel engaged in the long-voyage trade calls also at a foreign port of North or Central America before entering a port of the United States, can she claim the benefit of the 2-cent rate granted to vessels in the short-voyage trade? That is the question here. *A priori* one would think not and so the Director decided; correctly we submit. Obviously in such a situation the vessel enters the United States port from both the other ports: from the port within the long-voyage limits, taxable at the 6-cent rate, and from the North or Central American port within the short-voyage limits, taxable at the 2-cent rate. It is not suggested that she should pay tax both at the 6-cent rate, based on entry from the long-voyage port and also at the 2-cent rate based on entry from the short-voyage port or a combined rate of 8 cents.[31] May she then escape taxation at the long-voyage rate and pay only the short?

If a vessel thus trading to ports in both limits may demand that it be given the benefit of the reduced short-voyage rate although it enjoys the economic benefits of trading to the long-voyage ports, the purpose of the different tonnage rates will be defeated and a bonus will be conferred for carrying goods between North or Central American ports and ports of the United States. If a vessel coming from South American ports and entering at Los Angeles may reduce its tonnage tax from 6 to 2 cents per ton by first calling at a Mexican or Canadian

[31] Cf. *Trinity House* v. *Cedar Branch S. S. Owners* (1930, K. B.) 143 L. T. 352, 37 Ll. L. R. 173.

port, while the vessel that calls first at San Diego or San Francisco must pay the 6-cent rate, a preference in freights to the extent of the 4-cent per ton tax benefit will accrue to the nearby foreign port at the cost of other ports of the United States. Certainly this was not intended by Congress.

Let us look at the case presented to the Director for decision in the present matter. It is familiar that the intent and the performance of that intent determine what constitutes a voyage. *Friend* v. *Glouster Ins. Co.,* 113 Mass. 326, 332 (1873); cf. *The Circassian,* 2 Wall. 135, 151 (1864). Applying that principle, in no realistic sense can the fact that the *Montebello* last called at Vancouver be considered as putting her in a different position from that of the typical vessel engaged in the long-voyage trade. The intent, as shown by the crew's articles was for a voyage to South America and home. Admittedly she made such a voyage. Indeed the only effect is that the number of times she would enter and be subject to tax each year has been diminished because the addition of the Canadian leg of the voyage makes it take several days longer; it is so much the less a short-voyage entitled to the 6-cent rate. Plaintiffs are simply owners who arrange to work their vessel so that the voyage home in ballast with consequent loss of freight is only from Vancouver to Southern California instead of from a South American port to a California port. The saving of this more efficient operation cannot furnish a ground for a still further saving by a reduction in the tonnage tax from 6 to 2 cents.

In the circumstances disclosed by the conceded facts we believe it manifest that the Director correctly concluded that in fact plaintiff's vessel was not engaged in the short-voyage trade and that entering as she did from both a South American and a Canadian port she was correctly assessed tonnage tax at the single higher rate. Certainly it cannot be said that there is "no rational basis" nor "substantial evidence" for this conclusion of the Director. The court below therefore erred in substituting its opinion for that of the Director.

We submit that the Director's decision is equally well founded in point of law. The Act of August 5, 1909, c. 6, § 36, 36 Stat. 111, now in force (41 U. S. C. 121, *infra,* Appendix, p. 53, provides:

> A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands * * * and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port.

This language was derived from section 14 of the Act of June 26, 1884, c. 121, 23 Stat. 57, entitled "An act to remove certain burdens on the American Merchant Marine and encourage the American foreign-carrying trade." Prior to that Act tonnage tax was imposed upon all vessels of the United States arriving in the United States from foreign ports, at the rate of 30 cents per ton per annum, collected in a lump sum for a year in advance on the occasion of the vessel's first entry. Section 14 of that Act changed the rate and mode of collection as follows:

> That in lieu of the tax on tonnage of thirty cents per ton per annum, heretofore imposed by law, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India islands, the Bahama islands, the Bermuda islands, or the Sandwich islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports.[32]

[32] Section 11 of the Act of June 19, 1886, c. 421, 24 Stat. 81, amended the Act of 1884 so as to extend to all foreign countries the offer for reciprocal abolition of the tonnage tax and lighthouse dues made to North American ports by the Act of 1884. H. Rept. No. 175, 49th Cong., 1st sess., p. 2 [serial vol. 2435]; 17 Cong. Rec. 1108–1109. It is not pertinent here.

The purpose of the Act of 1884 was to place a smaller tax on vessels in the short-voyage trade with Canada and the West Indies, which was largely held by the vessels of the United States, and to end the discrimination against vessels of the United States which resulted from the circumstance that a large portion of our vessels then engaged in the foreign trade were sailing vessels making long voyages and entering our ports not much oftener than once a year while the foreign steamships, taking the cream of our European trade, entered from eight to ten times annually, resulting, practically, in a tax of 30 cents per ton on each entry of vessels of the United States and but 3 cents per ton on each entry of the British steamships.[33]

When Congress in 1909 reenacted the tonnage statute without substantial change, other than the reduction of the short-voyage rate from 3 to 2 cents, the statutory language had an established administration construction in the decisions of the Commissioner of Navigation, the predecessor of the present Director. The complications resulting from the omission of the Act of 1884 to deal specifically with the case of vessels entering from a voyage involving calls at both a long-voyage port and a North or Central American short-voyage port, had early presented themselves. The administrative interpretation was definitely established in 1887 by two decisions of the Commissioner. *The Hernan Cortez,* 1887 T. D. No. 8026; *The Marmion,* 1887 T. D. No. 8293.

The case of *The Hernan Cortez* was substantially identical with the case at bar. The vessel had cleared Barcelona, Spain, a 6-cent port, with cargo for Cuba and Puerto Rico only but

[33] The Committee Report states: "Under our reciprocal treaties with England and other maritime nations we cannot impose upon British and other foreign vessels engaged in our foreign trade a larger tax than we impose upon ours; but a decent regard for our own ought to lead us to change the mode of assessment from an annual to an entry tax. This is fair, as the tax should be adjusted to entries or voyages which represent business done, rather than time, as the latter inevitably discriminates against sailing vessels. * * * we recommend that it be fixed at 6 cents per ton for the long-voyage foreign trade and 3 cents per ton for the short-voyage trade, in the latter case not to exceed 15 cents per ton per annum. * * * In the short-voyage trade with Canada, the West Indies, Mexico, &c., which is largely held by American vessels, it will reduce the tax materially" (H. Rept. No. 5, 48th Cong., 1st sess., p. 4 [serial vol. 2253]).

with the intention of coming to the United States. She discharged her cargo in the West Indies, then 3-cent ports, and proceeded in ballast to New Orleans. On her entry the collector assessed tonnage tax at the 6-cent rate. The Spanish owners filed a protest through diplomatic channel.[34] The commissioner denied refund. The Secretary of the Treasury stated the basis of the decision in a letter of February 3, 1887 to the Secretary of State as follows (1887 T. D. at p. 67):

> It has been heretofore held by the Commissioner of Navigation whose decision in such cases is final, under the statute applicable, that when the voyage to the United States actually commenced at a European port, and one of the excepted ports is visited by the vessel, such visit constitutes merely an incident in the voyage from Europe, and that entry must be made as from a European port. Such was the decision in the case of the British steamship "Cella," which arrived from Shields, England, *via* Halifax, bringing no cargo from the port last named, and in fact carrying none to said port from Shields. She entered at Halifax, and cleared therefrom, and on her arrival in the United States was charged with tonnage at the rate of 6 cents per ton.
>
> Other similar decisions have been made, and it is considered that the ruling is in accordance with the terms of the statute, and that any other course would afford opportunities for an evasion of the law imposing the higher rate of duties. The regulation is applicable not only to Spanish vessels, but to British and all other foreign vessels, and also to vessels of the United States. Of course, if the vessel, instead of constituting a part of a line plying between Spain and the United States *via* certain foreign ports, had traded directly between a West Indian port and the United States, the lower rate of tax only would have been levied.[35]

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[34] The diplomatic correspondence is published in 1887 U. S. Foreign Relations, pp. 1023–1026.

[35] *The Cella*, 1885 T. D. No. 6787, was followed by *The Manitoban*, 1885 T. D. No. 6832. There the vessel cleared from 6-cent ports with cargo and passengers for both. She entered and cleared at Halifax, then a 3-cent port, and on entry at Philadelphia was assessed at the 6-cent rate. The commissioner denied refund. Cf. *The Craighill*, 1885 T. D. No. 6729.

In the case of *The Marmion,* the vessel cleared from Glasgow, a 6-cent port, intending to come to the United States. She proceeded to Port Cortez in the West Indies, then a 3-cent port, there loaded cargo and cleared for New Orleans. The collector at New Orleans applied the 6-cent rate and the commissioner denied refund, observing (1887 T. D. at p. 320):

> * * * you find that the master cleared her from Glasgow, Scotland, intending to come to the United States, and, in pursuance of the charter, proceeded to Port Cortez and loaded cargo for New Orleans, she being entered as having arrived from Glasgow. It appears that she was chartered in that city by a firm in New Orleans to engage in the tropical-fruit trade, between New Orleans and Central American ports, for a period of six months, and with a view to her purchase should she be found suitable.
>
> Had the vessel proceeded directly to your port from the European port, she would have been subject to dues at the rate assessed, and, she being destined to the United States, it is not considered that the law intended she should be put on any better footing as to the tax on tonnage by coming via a port in the West Indies, or be entitled to the privileges accorded vessels engaged in the direct trade between the West Indies and the United States.

It was thus settled that where a vessel enters from a voyage from both a long-voyage port and a short-voyage port, the long-voyage rate applies whether she comes in ballast to the short-voyage port and there takes cargo (*The Marmion*), comes with cargo to the short-voyage port, discharges and proceeds in ballast (*The Hernan Cortez*) comes in ballast all the way despite entering and clearing at the short-voyage port (*The Ceila*) or comes with cargo, some unladen at the short-voyage port and the rest at the United States port (*The Manitoban*).

Meanwhile the converse situation was presented of the taxation of vessels entering from a voyage the point of origin which was a port with which dues had been abolished on a basis of reciprocity under the amendment of 1886, but which included

an intermediate call at a taxable port. The commissioner, consistently with his decisions in the other situation, held that the highest of the two applicable rates should be assessed. Because of the international aspect of the matter President Cleveland, on January 14, 1889, transmitted to the Congress a letter from the Secretary of State inviting attention to the difficulties with which the commissioner was confronted in both types of situation and suggesting that Congress should clarify the act. The Secretary explained:[36]

> But in each case the vessel is required in effect to pay the highest rate, without reference to the amount of cargo obtained at the various ports from which she comes. Thus a penalty may practically be imposed in many cases on indirect voyages.
>
> It is conceived that in many instances the main purpose of the act may be defeated by these rulings, but it must be admitted that the law contains no provision to meet such cases, and that there would be great difficulty in the executive branch of the Government undertaking to decide that any particular measure of deflection from a direct voyage should or should not determine its character. This appears to be a proper subject for the consideration of Congress.
>
> But the undersigned has the honor to submit whether it would not at least be practicable in the case of vessels coming from two or more ports as to which different rates of tonnage dues are imposed in the United States, to apportion such dues on the basis of the relative portions of cargo brought from such ports.

But Congress took no action other than to reenact the provision in 1909 with the short-voyage rate further reduced from 3 to 2 cents [37] and the commissioner continued to follow his decisions of 1885 to 1888.[38]

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[36] H. Ex. Doc. No. 74, 50th Cong., 2d sess., pp. 7–8 [serial vol. 2651]; 1888 U. S. For. Rel. II, p. 1863.

[37] Act of August 5, 1909, c. 6, § 36, 36 Stat. 111 *infra*, appendex, p. 52; see 44 Cong. Rec. 4161.

[38] With respect to cases of calling at an intermediate port with a higher rate, see 1890 T. D. 10,379 pursuant to 190 p. A. G. 128; 1891 T. D. No. 11,949;

It is fundamental that statutes are to be construed in the light of the purposes sought to be achieved and the evils sought to be remedied (*United States* v. *Dickerson*, 310 U. S. 554, 561–562 (1940); *United States* v. *American Trucking Ass'n*, 310 U. S. 534, 542–543 (1940) and cases cited) and that in re-enacting a statute Congress sanctions its settled administrative interpretation (*United States* v. *Cerecedo Hermanos y Cia.*, 209 U. S. 337, 339 (1908); *Massachusetts Mut. Life Ins Co.* v. *United States*, 288 U. S. 269 273 (1933); *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932). Since the original provision was a remedial one designed to favor the typical short-voyage trade, its provisions are to be reasonably construed so as not to conflict with its basic objectives. Cf. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1923). It is submitted therefore that the decision of the Director was in accordance with the settled interpretation of his predecessors and is well founded in point of law as well as fully supported in the record and must be accepted by the courts.

III. In the circumstances of this case the six-cent rate alone correctly applies

For the reasons set out above (pp. 43–50) we submit that even if it be held that suit will lie against the collector and that the decision of the Director is subject to review and modification by the court, in the circumstances of the present case it is clear beyond any question that the *Montebello* entered from both Talara, Peru, and Vancouver, B. C. and the higher, or 6-cent rate, applies.

The view of the court below that "a vessel enters the United States from that foreign port from which she last cleared" is plainly contrary to the ordinary meaning of the term in the context here involved. It is obvious that on her return to the United States a vessel of the United States "enters from" all of

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1893 T. D. No. 14,531. With respect to cases of calling an an intermediate port with a lower rate, see 1895, T. D. No. 15, 741 and No. 15,889, 25 Op. A. G. 157.1. Since 1895 few decisions on tonnage have been published and none of substantial significance. With the transfer of the Bureau to the Department of Commerce and Labor in 1903 publication ceased and has not been resumed. The same principles, however, are followed as before.

the foreign ports at which she has called since her voyage out was completed and her home voyage began. The question of the rate of tonnage tax which Congress intended should be applied depends in essence upon the character of the voyage. A vessel returning from a voyage within the short-voyage limits of North and Central America is to be taxed at the 2-cent rate. A vessel returning from a voyage extending into the long-voyage limits—as to South America—is to be taxed at the 6-cent rate. Here it is undeniable that the voyage of the *Montebello* was to South America and back and was not within the short-voyage limits which Congress intended to be taxed at the 2-cent rate.

It is accordingly submitted that in any view of the case the judgment of the court below was erroneous and should be reversed.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and the case remanded with instructions to enter judgment in favor of the defendant collector.

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MARCH 1945.

APPENDIX

Act of August 5, 1909, c. 6, §36, 36 Stat. 111 (46 U. S. C. (1940) 121), provides:

> A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Burmuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland, and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.

Act of July 5, 1884, c. 221, § 3, 23 Stat. 119, as amended (46 U. S. C. (1940) 3), provides:

> The Director of the Bureau of Marine Inspection and Navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.

Act of June 26, 1884, c. 121, § 26, 23 Stat. 59, as amended (18 U. S. C. (1940) 643), provides:

> Whenever any fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or sea-

men has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same, the Secretary of Commerce, if on investigation he finds that such fine, penalty, forfeiture, exaction, or charge was illegally, improperly, or excessively imposed, shall have the power, either before or after the same has been covered into the Treasury, to refund so much of such fine, penalty, forfeiture, exaction, or charge as he may think proper, from any moneys in the Treasury not otherwise appropriated.

Regulations for documentation, entrance and clearance of vessels, tonnage duties and light money, etc., Secretary of Commerce and Director of the Bureau of Marine Inspection and Navigation, May 28, 1938, Part 3, § 6 (46 Code of Fed. Regs. 3.6), provide:

(a) On account of the expense and difficulty of obtaining a refund of money excessively or erroneously collected, customs officers are instructed to place in special deposit, if such course is practicable, money collected under protest or where there is reason to believe that application for refund will be made immediately.

(b) If, however, it is found necessary to deposit collections to the credit of the Treasurer of the United States on account of fiscal regulations, or for any other reason, and refund is asked, collectors may notify the payor to prepare an application requesting refund of the amount which he alleges was excessively or erroneously collected. In the preparation of this application the following instructions will be observed:

(1) The application must be in duplicate, each signed, addressed to the Director of the Bureau of Marine Inspection and Navigation, and submitted through the collector of customs.

(2) It must be a direct request for the refund of a definite sum, showing concisely the reasons therefor, the nationality, rig, and name of the vessel, and the date, place, and amount of each payment for which refund is

asked. A protest against a payment will not be accepted as an application for its refund.

(3) It must be made within 1 year from date of the payment. A protest against a payment will not alone be sufficient to bring a claim within the statute.

(4) The application and its duplicate should be forwarded to the Director of the Bureau of Marine Inspection and Navigation by the collector of customs after all statements which are of record in his district have been verified, and with such comments as he may choose to make.

(5) A certified statement, also in duplicate (Commerce Form 1086), should be carefully prepared and forwarded to the Director of the Bureau of Marine Inspection and Navigation after the collector has been so authorized. In preparing this statement the collector should bear in mind that it must be signed by the owner or charterer of the vessel, whose name and address must be given in every instance as the payee, even when the money to be refunded had been paid by an agent or representative, as the Comptroller General has held that such payor must look to his principal for repayment.

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